(1)

Supreme Court, U.S.
FILED

JUN 30 2003

No. 03-26

IN THE

Supreme Court of the United States

JAMES J. RODWELL,

Petitioner,

v.

PETER A. PEPE, JR., ETC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Fed. R. Civ. P. 60(b) permits the court to

> relieve a party . . . from a final judgment . . . (1) [for] mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . or (6) any other reason justifying relief from the operation of the Judgment.

The circuit courts have adopted three basic, distinct approaches as to whether this rule permits resurrection of a previously dismissed habeas petition. Some courts have held Rule 60(b) to be unavailable to previous habeas petitioners, while the Second Circuit has held that a Rule 60(b) motion is not properly viewed as a second or subsequent habeas petition. The First Circuit held in this petitioner's case that it was adopting an approach to Rule 60(b) in which the factual predicate of such a motion is determinative of whether it should be treated as a second and subsequent habeas petition.

The question presented is whether a motion, pursuant to Rule 60(b)(6) of the Federal Rules of Civil Procedure, to vacate a judgment denying habeas relief, should be considered a second or successive petition presented to the Court pursuant to Title 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA)?

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The petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The petitioner's convictions, and the denial of a 1983 motion for new trial, were affirmed in *Commonwealth v. Rodwell*, 394 Mass. 694, 477 N.E.2d 385 (1985). A second motion for new trial was denied in 1986 by the trial judge, and the denial of the petitioner's habeas corpus petition was affirmed in an unpublished opinion in 1987. *Rodwell v. Fair*, No. 86-2455, slip op. (D. Mass. April 13, 1987), *aff'd*, *Rodwell v. Fair*, 834 F.2d 240 (1st Cir. 1987) (per curiam).

The petitioner subsequently sought relief by means of motions for new trial in the state court, all of which were denied without hearing, including a 1997 motion for new trial based upon newly discovered exculpatory evidence that had been suppressed by the prosecution. That motion was accompanied by affidavits which included the sworn statement of a Suffolk County prosecutor that the chief investigator in the petitioner's Middlesex County case had appeared without notice to him in the Suffolk County Superior Court and undercut his sentencing recommendation in criminal proceedings (in Suffolk County) against the inmate who testified to the petitioner's supposed "jailhouse confession" in this (Middlesex County) case.

Following the denial of relief sought in motions for new trial in the state court, the petitioner was ordered to seek, and then was denied, a Certificate of Appealability on August 28, 2001. The petitioner filed a Rule 60(b)(6) motion because the habeas action is civil in nature, and in due course sought an appeal with the First Circuit Court of Appeals. *See Greene v. Tennessee Dept. of Correction*, 265 F.3d 369, 371 (6th Cir.

2001); *Stringer v. Williams*, 161 F.3d 259 (5th Cir. 1998). He filed a claim of appeal on October 10, 2001. *See* 28 U.S.C. § 2244(b)(3).

Although a Rule 60(b)(6) motion sounds in civil appellate procedure, the court denied relief (per Young, C.J., 183 F. Supp. 2d 129), assuming that a post-judgment motion under that Rule would comprise a second or successive petition, subject to the AEDPA's restrictions. *Cf. Thompson v. Calderon* (9th Cir. 1998) (en banc), and cases cited. In the interim, the petitioner therefore filed a motion for leave to file a second and subsequent petition for a writ of habeas corpus, a request that was denied by the First Circuit. *Rodwell v. Pepe* (No. 99-2109), 183 F. Supp. 2d 129 (1st Cir. 1999).

The court of appeals' opinion denying relief (No. 01-2411, per C.J. Selya, Stahl, and Lynch) affirming is published at 324 F.3d 66 (2003).

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on April 1, 2002. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of Rule 60(b)(6) of the Federal Rules of Civil Procedure, and of Title 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) are relevant to this petition. Pub. L. No. 104-132, §§ 101-107, 110 Stat. 1214, 1217-26 (codified as amended in 28 U.S.C. §§ 2244, 2253-2255, 2261-2266 (2000).

STATEMENT OF THE CASE

In November, 1981, the petitioner was tried in Middlesex County, in the Commonwealth of Massachusetts, for a 1978 shooting and was convicted of murder, armed robbery, and illegally carrying a firearm. He was sentenced to a mandatory term of life imprisonment for murder; a concurrent eighteen-to-twenty term for armed robbery; and three-to-five years for carrying a firearm.

There was no forensic evidence linking the petitioner to the charged offenses. The Commonwealth's case relied on two witnesses: an immunized witness who drove the victim to the murder scene and who drove away after the shooting, and an inmate who had the opportunity to confer with the immunized witness while both witnesses were incarcerated prior to trial and faced multiple life sentences, and who claimed the petitioner confessed to him after being implicated by the immunized witness (who was in federal custody in 1981, and was a former employee of the petitioner's).

In state court post-conviction proceedings, the petitioner has been denied even an evidentiary hearing, upon proffering a showing that, for example:

- State prosecutors failed to disclose that David Nagle, the chief "jailhouse informant" witness against the petitioner, was a long-standing paid informant whose tenure as an undercover agent with the DEA, as well as an informant for additional state and federal law enforcement sponsors, included 1981, the year in which he first implicated and then testified against the petitioner;

- State prosecutors never disclosed that the DEA used Nagle as an undercover agent while he served a

Massachusetts sentence, which would have supplied the factual showing that the Commonwealth's Supreme Judicial Court determined was missing when, in the petitioner's direct appeal, it refused to reach the issue of whether Nagle was a government agent with a stake in confabulating a jailhouse "confession" to curry favor with law enforcement authorities to whom he had been reporting (*See Commonwealth v. Rodwell*, 394 Mass. 694, 477 N.E.2d 385);

- Nagle's undisclosed tenure as a DEA operative included his testimony to an alleged "jailhouse confession" in an unrelated case;

- Nagle falsely testified that his sole concrete consideration for testifying against the petitioner was a transfer to a western Massachusetts jail, information which has been repeatedly and successfully invoked by the government as supposedly evidencing that the jury heard "sufficient" testimony concerning Nagle's "bias" notwithstanding its failure to disclose additional exculpatory evidence;

- Nagle falsely testified, in testimony relied upon by the Supreme Judicial Court in rejecting the petitioner's contention that Nagle was a government agent, that he had no contact with any law enforcement officer about this case until July 14, 1991, when in fact, an undisclosed *June 12, 1981* hearing before a Middlesex County Superior Court judge revealed that Middlesex County prosecutors were well aware of, and withheld from the defense, the fact that well before either Nagle or the Commonwealth's chief police investigator that Nagle first implicated the petitioner in this case,

Nagle had "given a great deal of information to the Suffolk D.A.'s office and actually to some Middlesex police as well, regarding other matters. *On the Suffolk cases they intend to transfer him to the western part of the State for safety purposes*";

- It was not until well more than a decade afterwards, subsequent to the petitioner's application for a writ of habeas corpus, that the existence of that proceeding involving Nagle and a Middlesex County prosecutor finally was unmasked by an investigative reporter;

- After Nagle spoke to the Commonwealth's chief investigator, and implicated the petitioner, his undisclosed rewards included a prompt reduction in bail, and assuredly did *not* include the one concrete benefit (that of a jail transfer) that the jurors were misled to believe stemmed from his cooperation in this particular case and county (*See Commonwealth v. Rodwell*, 394 Mass. at 696, 477 N.E.2d at 387);

- Nagle falsely testified that he first spoke to law enforcement officials about the killing at issue in the petitioner's case in July of 1981, approximately four weeks *after* an undisclosed bail hearing at which Nagle's own counsel had alluded to his prior and ongoing "cooperation" with Middlesex investigators and assured forthcoming guilty pleas *on the very charges as to which Middlesex County's chief investigator in the case, Lieutenant Spartichino, would be making a surprise appearance at Nagle's sentencing in unrelated cases in another county*, and despite Nagle's trial testimony that the Commonwealth's chief investigator made "no promises," but would merely speak on Nagle's behalf

and write a (never-produced) letter explaining Nagle's cooperation;[1]

---

1. Nagle's now demonstrably false claim not to have received any promises from the Commonwealth could not have been more specific, or central to the Commonwealth's contention that Nagle had nothing to gain from his testimony: the prosecutor questioned Nagle as follows (Trial Transcript, Volume IV, pp. 142-144 [emphasis supplied]):

> Q. Mr. Nagle, I'd like to ask you, sir, did you have a reason for talking to Lieutenant Spartichino [the Commonwealth's chief investigator in the petitioner's case]—
>
> A. Yes.
>
> Q. —and not doing what the defendant asked?
>
> A. I had a few reasons.
>
> Q. Would you tell this jury what your reasons were, sir?
>
> A. Well, I had enough problems of my own with what I have pending against me, and I wasn't about to get involved in perjury in a capital case. It could be a life sentence for perjury. And also, the lieutenant could speak on my behalf.
>
> Q. Now, with regard to the latter, speak on your behalf, would you indicate on what?
>
> A. On the cases I had pending against me.
>
> Q. *When you first met with Lt. Spartichino, before you actually told him anything, sir, was anything promised or offered to you in exchange for your testifying or talking*?
>
> A. *No, he was quite emphatic about that—no promises.* He said he would speak on my behalf, and write a letter.
>
> Q. Concerning what?
>
> A. Well, I have cases in Suffolk County and Middlesex.

(Cont'd)

- The contents of Nagle's bail hearing, impounded and never disclosed by the Middlesex District Attorney's Office to the defense in this case, coupled with the eventual disposition of those charges against Nagle, suggest an undisclosed and comprehensive plea agreement between the Middlesex District Attorney's Office and Nagle with respect to the multiple serious life felony charges then pending against Nagle in two counties;

- The Commonwealth's chief investigator falsely swore, in successfully opposing the petitioner's first motion for new trial, that in consideration for Nagle's testimony against the petitioner, the investigator merely "intended to notify the Middlesex and Suffolk County District Attorneys of Mr. Nagle's cooperation." In fact, withheld documents demonstrate that he had no need to do inform the Middlesex prosecutors, who were already well aware of Nagle's cooperation, and the lead investigator instead undercut a Suffolk County prosecutor by making a secret presentation to the sentencing judge at the bench, to the prosecutor's great surprise and consternation, when it came time to dispose of various serious Suffolk County cases against Nagle;

(Cont'd)

Q. And what did the lieutenant say he would do?

A. That he would speak on my behalf.

Q. *But did he promise you anything?*

A. No, no way.

Q. *Was anything said that you would get any particular outcome or disposition for any case?*

A. *None whatsoever.*

- Nagle's undisclosed Middlesex bail hearing reveals that Nagle was furnishing information to both Middlesex and Suffolk authorities *prior to June 12, 1981*, at which time he had pending against him the very same serious felony matters as to which Lieutenant Spartichino appeared successfully to undercut a Suffolk County prosecutor's sentencing recommendation after Nagle had testified against the petitioner in this case;

- Withheld information concerning the June 12, 1981 bail hearing disclosed not only that Nagle lied to the petitioner's jury about the nature of the consideration for his testimony against the petitioner, but also that his lie before the jury took the uniquely invidious form of suggesting that any inclination towards the Commonwealth in this case was motivated by gratitude for being safeguarded against some threat posed to him by this petitioner. In fact, Middlesex prosecutors were aware, and failed to reveal, that Nagle's transfer was in fact accomplished in order to safeguard him in relation to information he was furnishing in distinct cases in another county;

- The prosecutor elicited from Nagle the false testimony that he pleaded guilty to a larceny in July of 1976, and then was not arrested or convicted of any crime again until September 11, 1980. In fact, Nagle's probation records, never disclosed by the Commonwealth despite a specific pre-trial order that they be provided to the defense, reveal that he was charged and convicted of crimes on July 26, 1976, October 28, 1976, January of 1979 and May of 1980, and reveal at least *eight additional undisclosed pending armed robbery charges* against him when he began implicating the petitioner;

- Neither probation records, nor complete criminal records, nor a complete accounting of rewards or inducements to *either* Holmes or Nagle, ever was provided to the defense. For example, the jury heard about only twelve expurgated and self-serving versions of *fifty-one* criminal charges against Nagle. The petitioner's jury heard about a lone armed robbery charge against Nagle, and eight "larcenies" which the jurors were never told had been reduced from armed robberies; they did not hear anything of an additional *twenty-six* armed robbery charges;

- An undisclosed Suffolk County change of plea hearing on February 26, 1982 culminated an undisclosed assurance by Nagle's counsel, made *five months prior to the petitioner's trial,* as to Nagle's ongoing cooperation with Middlesex and Suffolk authorities and his forthcoming pleas on the multiple Suffolk County charges;

- At that February, 1982 plea hearing, Lieutenant Spartichino, *without even consulting the assistant district attorney in the pertinent case*, along with an *unidentified individual* whose identity has never been disclosed to the petitioner, approached the judge, who immediately undercut the prosecutor's fifteen-to-twenty year plea recommendation and instead sentenced Nagle to only seven-to-twelve years despite his lengthy and serious criminal record;

- Nagle could not possibly have heard any alleged confessions from the petitioner in the Billerica House of Correction, because Nagle testified he first met the petitioner there on May 22 or May 23, 1981, and that the allegedly inculpatory conversations did not occur until *seven to ten days thereafter*: the

petitioner had not yet arrived at Billerica then, and the day after the petitioner did arrive at Billerica pending trial, correctional officers launched a strike during which there was an institution-wide lock-up and no such conversations could have taken place;

- The Middlesex District Attorney's Office did not turn over to the defense photographs taken the night of their crime scene investigation which would have revealed conditions dramatically at odds with the immunized witness's testimony; and

- The Middlesex District Attorney's Office did not turn over to the defense police reports, including one of an interview of a witness who reported seeing someone else commit the murder for which the petitioner has been deprived of his liberty for more than two decades.

In the petitioner's direct appeal, the Commonwealth of Massachusetts' Supreme Judicial Court ruled that he had not made an adequate showing that the jailhouse informant against him was a government agent, and thus that supposed admissions to Nagle should have been excluded as violating the petitioner's Sixth Amendment right to the assistance of counsel. *See Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199 (1964). *See also e.g., United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183 (1980).

The Supreme Judicial Court ruled, however, that the petitioner at that time had "presented no significant facts in support of the claim that Nagle was a government agent," having alleged only "that Nagle had received the benefit of being transferred to Greenfield," a fact with "little, if any, relevance to the question whether Nagle was a government agent at the times he and the defendant spoke at Billerica." *Commonwealth v. Rodwell*, 394 Mass. at 698, 477 N.E. 2d at 388.

Of enormous relevance to the question of whether Nagle was a government agent when he supposedly spoke to the petitioner in early June of 1981, however, was information withheld by the prosecution, including Nagle's own counsel's undisclosed representation to a Middlesex Superior Court judge that, only a few days after Nagle claimed to have heard the "confession," Nagle had been furnishing information to both Middlesex and Suffolk County authorities.[2] *See Newell v. Hanks*, 283 F.3d 827, 831, 835-837 (7th Cir. 2002) (petitioner not procedurally barred barred by AEDPA from federal review of *Brady* argument concerning state's concealment of evidence of agreement with confidential informant). *See also e.g.*, *Crivens v. Roth*, 172 F.3d 991, 995 (7th Cir. 1999) ("We will not penalize [petitioners] for presenting an issue to us that [they] were unable to present . . . because of the state's misconduct.")

Thus, within scant days of the time in early June, 1981, when Nagle purported to hear a "jailhouse confession" from the petitioner, Nagle's attorney was in a Middlesex County courtroom, with a Middlesex County prosecutor, discussing Nagle's cooperation with authorities who specifically included Middlesex police, and alluding to an extant agreement by which Nagle would be pleading guilty in Suffolk County cases—the very same cases on which Nagle ended up with sentences to run concurrent with his extremely lenient Middlesex sentence, after the chief investigator in the instant case arrived, unannounced, unbidden, and

2. The Middlesex District Attorney's Office never disclosed that its officer was present in a Suffolk County courtroom on June 12, 1981, as Nagle's attorney outlined how helpful Nagel had been both to Middlesex and to Suffolk County authorities: prosecutors demonstrably were well aware of, and withheld from the defense, the fact that on June 12, 1981, well before both Nagle and chief investigator Spartichino swore that Nagle first implicated the petitioner in this case, Nagle had in fact "given a great deal of information to the Suffolk D.A.'s office and *actually to some Middlesex police as well*, regarding other matters."

unwelcome, at the Suffolk County sentencing and successfully undermined the Suffolk County prosecutor's recommendation.

All of this information was withheld by a prosecutor on explicit notice of the *Brady* and *Massiah* issues,[3] and whose witnesses provided pivotal accounts at trial, which proved to be directly at odds with withheld information. None of this critical information could have been discovered by the defense because the government violated its continuing duty to disclose that information.[4] *See, e.g., Newell v. Hanks, supra.*

"Where, as here, the Petitioner has made a pretrial request for specific exculpatory information, reversal is required if nondisclosure 'might have affected the outcome of the trial.'" *United States v. Devin*, 918 F.2d 280, 289 (1st Cir. 1990). In this instance, where the trial was based *solely* on the credibility to be accorded informant-witnesses, compliance with the government's discovery obligations not only would have affected the trial's outcome, but would have removed any plausible basis for reasonable triers of fact to have convicted the petitioner.[5]

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3. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

4. The Middlesex District Attorney's office was aware that Nagle had in fact been working for both Middlesex and Suffolk authorities *at the time he was offering to testify to the petitioner's supposed jailhouse confession*. In addition, prosecutors either knew or should have hewed to their duty to ascertain, the length and breadth of a relationship with both federal and state law enforcement authorities which in fact rendered Nagle nothing less than a professional informant. *See Kyles v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567 (1995).

5. Withheld information would have enabled the petitioner to show that, far from Nagle's merely "hop[ing] that [the police] would

(Cont'd)

The petitioner's trial, and its subsequent lack of meaningful review in the state courts, was "incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 154 (1972), quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935). *See also e.g.*, *DuBose v. Lefevre*, 619 F.2d 973, 979 (2d Cir. 1980).

The petitioner has never been accorded even a hearing despite demonstrating that Nagle lied to the jury about his criminal record; that he lied about the actual nature of the consideration extended to him for his testimony in *this* case; and that he lied about the supposedly non-specific nature of the consideration actually rendered to him—consideration

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(Cont'd)
'speak in [his] behalf' with respect to the serious criminal charges he then faced," *Rodwell v. Fair*, 834 F.2d 240, 242, Nagle in fact had an undisclosed, very specific and inordinately favorable deal for leniency, to which prosecutors were parties. *See Ely v. Matesanz*, 983 F. Supp. 42 (D. Mass. 1997). This was quintessentially the "type of evidence [that] can make the difference between conviction and acquittal." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52 (1987).

In addition, notwithstanding court orders to do so, prosecutors never disgorged to the petitioner either probation records, or complete criminal records, or a complete accounting of rewards or inducements to *either* of the two men whose testimony comprised the entirety of the Commonwealth's case. To the contrary, prosecutors defrauded the court by permitting Nagle to lie outright to the jury about his own criminal record. Thus, for example, the jury heard about only twelve expurgated and self-serving versions of *fifty-one* criminal charges against Nagle. The petitioner's jury heard about a lone armed robbery charge against Nagle, and numerous "larcenies" which the jurors were never told had been reduced from armed robberies; they did not hear anything of an additional *twenty-six* armed robbery charges. *See Ouimette v. Moran*, *supra*. *See also e.g.*, *Flemmi v. Gunter*, 410 F. Supp. 1361, 1371 (D. Mass. 1976); *United States v. Tracey*, 675 F.2d 433, 437 (1st Cir. 1982). *See Davis v. Alaska*, 415 U.S. 308, 315-316 (1974); *Alford v. United States*, 282 U.S. 687 (1931).

that at very least included a deal as to the disposition of Suffolk County charges which resulted in a level of leniency shocking to the prosecutor who handled those cases, which could, and, in light of his actual record, should have yielded Nagle multiple life sentences.[6]

Disclosure of Nagle's full record and long history with law enforcement would have apprised the fact-finders of the disingenuousness of this chief witness's protestations that he had no concrete hopes of personal reward in exchange for his testimony against the petitioner, supposedly garnered while the petitioner was awaiting trial based solely upon Holmes' story. *See, e.g.*, *United States v. Leja*, 568 F.2d 493, 498 (6th Cir. 1977). Instead, the withheld information enabled prosecutors fraudulently to present a sole "corroborating" witness as a tyro in the system, with no definite expectation of reward.

This was a case bereft of physical evidence. There was not a lone fingerprint, nor a single fiber to tie the petitioner to the unsolved crime. The petitioner was never pursued as a suspect prior to being named by Holmes when Holmes was in federal custody years after the crime. *Compare, e.g.*, *Gilday v. Callahan*, 59 F.3d 257, 270 (1st Cir. 1995) (overwhelming evidence against petitioner); *Commonwealth v. Hall*, 369 Mass. 715, 727-728, 343 N.E.2d 388 (1976) (abundant evidence apart from witness whom defense had sought to

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6. The jury having been fraudulently misled regarding the accusing witnesses' criminal records and about the reason for Nagle's transfer to a western Massachusetts jail, the truth-seeking process was once again compromised by the failure to expose ***promised*** leniency to a critical witness. *Ely v. Matesanz*, 983 F. Supp. 42 (D. Mass. 1997); *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988) ("It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence"); *United States v. Meinster*, 619 F.2d 1041, 1045 (4th Cir. 1980).

impeach). There was no disinterested witness who inculpated the petitioner. *Cf. Kyles*, *supra* (reversing for failure to disclose exculpatory evidence even where physical evidence linked petitioner to crime).

There was no physical evidence linking the petitioner to the crimes. There was no claimed eyewitness other than Holmes himself—the same immunized witness whose "testimony blaming someone else could secure his release entirely from criminal responsibility for a murder he had committed; his motivation to lie could not have been greater." *Gilday v. Callahan*, 59 F.3d at 269. Compare, e.g., *Id.* at 269; *Flemmi v. Gunter*, 410 F. Supp. 1361 (D. Mass. 1976).

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RESOLVE THE CONFLICT AMONG CIRCUIT COURTS AS TO WHETHER, OR IN WHAT CIRCUMSTANCES, A RULE 60(b)(6) MOTION SHOULD BE DEEMED TO CONSTITUTE A SECOND OR SUBSEQUENT PETITION PRESENTED TO THE COURT AS THAT TERM IS DEFINED AND INTERPRETED UNDER TITLE 28 U.S.C. § 2244, PARTICULARLY WHERE THE FIRST CIRCUIT'S DISPOSITION OF THIS CASE IS IN TENSION WITH THIS COURT'S PREVIOUS DECISIONS CONCERNING THE APPROPRIATE RESOLUTION OF CASES IN WHICH PETITIONERS HAVE ACTED WITH APPROPRIATE DILIGENCE AND BEEN THWARTED BY STATE MISCONDUCT.

The petition should be granted because the First Circuit's decision conflicts with holdings of this Court and of other circuits, and because resolution of the dispute requires a national rule interpreting an essential provision of federal criminal procedure. In addition, the First Circuit's failure to grant relief to the petitioner betrays a tension with

this Court's previous holdings in cases interpreting the AEDPA. *See, e.g., Williams v. Taylor*, 529 U.S. 420, 436-437, 120 S. Ct. 1479, 1491, 146 L. Ed. 2d 435 (2000) (petitioner who exercised due diligence was entitled to evidentiary hearing on claims of juror bias and prosecutorial misconduct; AEDPA's goals of comity, finality, and federalism, are not served by foreclosing federal review where factual bases for claims was not reasonably earlier available to petitioner).

Circuit courts which have addressed the issue of whether a Rule 60(b)(6) motion should be deemed a second or subsequent petition under the AEDPA previously had subscribed to three distinct and conflicting approaches to that issue; in this case "of first impression," the First Circuit has adopted its own case-by-case permutation in between the majority approach and, at the other extreme, the Second Circuit's approach to the issue. *Rodwell v. Pepe*, *supra* at 68.

This case therefore presents a compelling one in which to resolve the existing conflict among the circuit courts. As the First Circuit's decision acknowledges, "[d]espite its narrowness, this question has significant implications for habeas procedure—and the courts of appeals that heretofore have grappled with it have reached divergent conclusions." *Id.* at 69.

As the First Circuit's opinion notes, there are three "principal schools of thought on this controversial subject." *Rodwell v. Pepe*, *supra* at 67. "Some courts have held that Rule 60(b) remains fully velivolant in the habeas context," a "permissive approach . . . [that] seems to elevate form over substance," *Id.* at 67, 70.[7] Others have deemed Rule 60(b)

7. A habeas motion seeks to invalidate a state court judgment of conviction. A motion under Rule 60(b), on the other hand, seeks (Cont'd)

unavailable to habeas petitioners, a "rigid rule . . . [that] seems to sweep too broadly."[8] *Id.* at 67, 70. *See, e.g., Mobley v. Head*, 306 F.3d 1096, 1096 (11th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974, 975 (10th Cir. 1998) (per curiam); *McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996); *Felker v. Turpin*, 101 F.3d 657, 661 (11th Cir. 1996). A "third camp consists of courts that, with slight variations, advocate a course somewhere between these extremes." *Id.*

The First Circuit denied the petitioner relief, holding that his motion, by seeking to prove the constitutional infirmity

(Cont'd)

to vacate the federal court judgment denying relief: "while it is undoubtedly a step on the road to the ultimate objective of invalidating the judgment of conviction, it does not seek that relief. It seeks only to vacate the federal court judgment dismissing the habeas petition." *Rodriguez v. Mitchell*, 252 F.3d 191, 198 (2d Cir. 2001). The *Rodriguez* court reasoned that allowance of a Rule 60(b) motion would merely reinstate the previously dismissed habeas petition, opening the way for the further proceedings which may be necessary in order to secure justice in a given case, and guarding against the grave constitutional errors inherent in an unjust incarceration. The net effect of a successful Rule 60(b) motion in this view is simply to vacate the federal judgment dismissing the habeas petition, and not to vacate the state conviction, and thus such a motion should not be treated as a second or successive petition pursuant to § 2244(B).

8. The majority of jurisdictions which have directly addressed the issue have treated a Rule 60(b) motion to reconsider the denial of a petition for a writ of habes corpus as a second or successive motion for a writ of habeas corpus. *See, e.g., Harris v. Cotton*, 296 F.3d 578, 579-80 (7th Cir. 2002); *Lopez v. Douglas*, 141 F.3d 974 (10th Cir. 1998) (per curiam); *United States v. Rich*, 141 F.3d 550, 551 (5th Cir. 1998), and cases cited. *See also e.g., McQueen v. Scroggy*, 99 F.3d 1302, 1335 (6th Cir. 1996) (interpreting pre-AEDPA mechanism pursuant to 28 U.S.C. § 1154). This Court granted certiorari in a case raising the issue of the possible application of AEDPA to a Rule 60(b) motion. *Abdur'Rahman v. Bell*, 226 F.3d 696 (6th Cir. 2000), *cert. granted*, __ U.S. __, 122 S. Ct. 1605, 152 L. Ed. 2d 620 (April 22, 2002). Petition for certiorari dismissed as improvidently granted December 10, 2002, No. 01-9094.

of his conviction, "is a paradigmatic habeas claim." *Rodwell v. Pepe*, *supra* at 72. "It is, therefore, subject to AEDPA's restrictions on the filing of second or successive habeas petitions, rather than to the conventional jurisprudence of Rule 60(b)." *Id.* Tautologically, the First Circuit characterized the petitioner's proffer of an ongoing fraud stemming from improperly withheld evidence—including evidence withheld during the original habeas proceeding—as seeking "an end run around the strict limitations that the AEDPA imposes upon the filing of second or successive habeas petitions," and as incompatible with the denial of his application to file a second habeas petition. *Id.*

To determine, as the First Circuit did in this case, that the AEDPA's "harsh" procedural regimen "dovetails with Congress's intent," is unreasonably to elevate one purpose of those restrictions, to the exclusion of other compelling purposes and constitutional considerations: it is true that AEDPA was "designed to curb the abuse of the habeas corpus process, and particularly to address the problem of delay and repetitive litigation;"[9] but in no sense does the legislative history of the AEDPA support a conclusion that Congress sought finality at the expense of the vindication of petitioners who are blameless in "failing" to have earlier been able to raise their claims.

The First Circuit's approach not only is internally inconsistent,[10] but is at odds with holdings of this Court. The AEDPA "does not equate prisoners who exercise diligence in pursuing their claims with those who do not."

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9. *Rodwell v. Pepe*, *supra*, 324 F.3d at 72, citing H.R. Rep. No. 104-23 (1995), 1995 WL 56412, at *8.

10. The First Circuit purports to recognize that "[m]istake and fraud" are among the examples of circumstances "which might justify setting aside a judgment denying habeas relief although not addressing the underlying criminal conviction." *Rodwell v. Pepe*, *supra*, at 70.

Williams v. Taylor, *supra* at 436, 1490. If, for example, as in this case, a claim "was pursued with diligence but remained undeveloped in state court because . . . the prosecution concealed the facts," a prisoner should not be barred from a hearing on his claim under the statute. *Williams v. Taylor*, 112 F.3d 131, 136 (3d Cir. 1997). The "harsh" construction accorded by the First Circuit to the AEDPA's strictures implies absolutes which simply cannot be found in the pertinent statutory language: "[T]his harsh heading . . . would attribute to Congress a purpose or design to bar evidentiary hearings for diligent prisoners with meritorious claims just because the prosecution's conduct went undetected in state court." *Id.*

In no sense were the Congressional interests in finality intended to trump the most fundamental constitutional guarantees: the *Brady* rule "is founded upon the most basic constitutional guarantee . . . the right to due process of law and a fair trial. The government is not entitled to convict a person and send him to prison while it conceals from him material evidence that tends to show he is not guilty." *Watkins v. Miller*, 92 F. Supp. 2d 824, 826 (U.S.D.C., S.D. Indiana 2000).

The First Circuit, conceding a "Faustian bargain between Nagle and the prosecutor," *supra* at 72, "acknowledge[d] that, despite the petitioner's numerous attempts to expose the full extent of the relationship between Nagle and the state prosecutor, no court has exhaustively addressed that claim." *Rodwell v. Pepe*, *supra* at 72. *But See Williams v. Taylor*, *supra*, 529 U.S. at 437, 120 S. Ct. at 1491 ("comity is not served by saying a prisoner 'has failed to develop the factual basis of a claim' where he was unable to develop his claim in state court despite diligent effort.").

The petitioner respectfully submits that this Court should determine whether to follow the majority rule which the

District Court judge assumed governed the instant motion, or the contrary position adopted by the Second Circuit, or some version of third-prong approach adopted in this case by the First Circuit. In addition, this Court should determine whether any of those positions is consistent with its own prior interpretations of concomitant provisions of the AEDPA. *See, e.g., Williams v. Taylor, supra.*

In addition, this Court should provide the circuit courts with guidance as to whether the inextricably interrelated misconduct of state and federal authorities, when it involves an aspect of a criminal trial as essential as the nondisclosure of a critical witness's relationship with both state and federal law enforcement authorities, constitutes a variety pf continuing fraud on the district court (which in this case decided the petitioner's original habeas petition), and as such should operate to relieve a petitioner from the AEDPA's barriers—even in the view of many circuits which follow the most restrictive (majority) rule. *See, e.g., Banks v. United States*, 167 F.3d 1082 (7th Cir. 1999) (per curiam) (Rule 60(b) motion not treated as second or successive habeas motion where it challenged integrity of federal habeas proceedings).

Even those jurisdictions which have declined to follow the Second Circuit's approach to Rule 60(b) motions have conceded that the AEDPA does not bar a second or successive petition for habeas corpus based upon fraud upon the district court that initially passed upon the defendant's habeas petition. *See, e.g., Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). Here the petitioner has established, but never been granted a hearing upon, claims that fraud by prosecutorial authorities permeated the proceedings against him, including the reiteration of the state's prosecutorial fraud in the district court proceedings. *See Demjanjuk v. Petrovsky*, 10 F.3d 338, 348 (6th Cir. 1993).

At least one court that follows the majority approach has observed that "Rule 60(b) has a very broad scope and it is easy to imagine cases in which allowing a prisoner to file a motion under it would pose no risk of conflict with the limitations that AEDPA places on successive collateral attacks on state or federal criminal judgments." *Dunlap v. Litscher*, 301 F.3d 873, 875 (7th Cir. 2002). This is such a case: even under the stricter majority approach, the petitioner has made a sufficient showing that his first federal habeas corpus proceeding was dismissed as a result of the same fraudulent representations to the federal court as were advanced by state prosecutors at the state trial level, and thus "AEDPA would not be offended by allowing the district court to entertain the motion" to vacate the judgment of dismissal. *Id.*; *see Banks v. United States*, 167 F.3d 1082, 1083-84 (7th Cir. 1999) (per curiam); *Thompson v. Calderon*, 151 F.3d 918, 921 n.3 (9th Cir. 1998) (en banc).

Further, the petitioner has provided a sufficient showing of "unusual and exceptional circumstances" entitling him to maintain an independent action for relief, under civil habeas principles. *See Barrett v. Secretary of Health & Human Services*, 840 F.2d 1259, 1263 (6th Cir. 1987).

Numerous instances of willful prosecutorial misconduct, which have never garnered the petitioner an appropriate hearing, demonstrate "injustices . . . sufficiently gross to demand a departure from rigid adherence to the doctrine of res judicata," and only the allowance of a fair hearing in the safe harbor of federal court will serve to prevent "a grave miscarriage of justice." *See United States v. Beggerly*, 524 U.S. 38, 46-47, 118 S. Ct. 1862, 141 L. Ed. 2d 32 (1998). The extrinsic fraud in this case is comprised by that conduct, on the part of both state and federal authorities, which has heretofore prevented the petitioner from presenting his claims in court. *See 2300 Elm Hill Pike, Inc. v. Orlando Residence, Ltd.*, 168 F.3d 490, at p. 2 (6th Cir. 1998 [unpublished]).

The federal court remains the only "safe harbor" where the petitioner may secure fair exploration of crucial claims of fraud by state trial prosecutors, and in turn by federal officials who also had an ongoing, undisclosed relationship favoring the lone witnesses against him. This doctrine "serves as the last line of defense against a fundamentally unjust incarceration." *Mills v. Jordan*, 979 F.2d 1273, 1277-1278 (7th Cir. 1992), *superseded by statute on other grounds*. *See Watkins v. Miller*, *supra* at 834, 843 (issuing writ of habeas corpus where there was systemic prosecutorial failure to comply with discovery requirements, and where sole direct evidence of guilt was alleged jailhouse confession to person with long criminal record and record of cooperation in exchange for official consideration).

At very least, the petitioner should have been granted an evidentiary hearing concerning whether the state's habeas counsel, in the initial habeas proceeding, duplicated the fraud committed by state trial prosecutors who utterly failed to meet their constitutional obligations of disclosure.

The petitioner has never been given an opportunity to appear in any courtroom to present this evidence of systemic, insidious, intentional misconduct, including the use of perjured testimony and the suppression of exculpatory evidence, which deprived him of a fair trial and has resulted in his continuing incarceration. He demonstrated the exceptional circumstances which warrant extraordinary relief under Rule 60(b). *See Davila-Alvarex v. Escuela de Medicina Universidad Central Del Caribe*, 257 F.3d 58, 63 n.8 (1st Cir. 2001); *Morris v. Horn*, 187 F.3d 333, 341 (3d Cir. 1999), quoting *Reform Party v. Allegheny County Dep't of Elections*, 174 F.3d 305, 311 (3d Cir. 1999) (en banc); *First Fidelity Bank, N.A. v. Gov't of Antigua & Barbuda*, 877 F.2d 189, 196 (2d Cir. 1989). *See also Watkins v. Miller*, *supra* at 831.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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